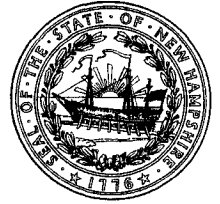




The State of New Hampshire  
**Department of Environmental Services**



Michael P. Nolin  
Commissioner

Charles Capistran  
d/b/a Julien Richard Company  
281 Rhode Island Avenue  
Manchester, NH 03104

Re: Cleveland Street, Manchester, NH  
AST Facility No. 2003-06072

**NOTICE OF PROPOSED  
ADMINISTRATIVE FINE**

**No. AF 05-057**

June 23, 2005

**I. INTRODUCTION**

This Notice of Proposed Administrative Fine is issued by the Department of Environmental Services, Waste Management Division to Charles Capistran, pursuant to RSA 146-A and NH Admin. Rule Env-C 601. The Division is proposing that fines totaling \$4,000 be imposed against Charles Capistran for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

**II. PARTIES**

1. The Department of Environmental Services, Waste Management Division ("the Division"), is a duly constituted administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, NH.
2. Charles Capistran is an individual registered to do business as "Julien Richard Company" in New Hampshire and having a mailing address of 281 Rhode Island Avenue, Manchester, NH, 03104.

**III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS**

1. RSA 146-A authorizes DES to minimize contamination of the waters and land of the state due to improper storage and handling of petroleum by establishing requirements for the operation of aboveground petroleum storage facilities. Pursuant to RSA 146-A:11-c, the Commissioner of DES has adopted NH Admin. Rules Env-Wm 1402 to establish requirements for the registration, design, installation, operation, maintenance, and monitoring of above-ground petroleum storage facilities.
2. RSA 146-A:15 authorizes the Commissioner of DES to impose administrative fines of up to \$2,000 per offense upon any person who violates any provision of RSA 146-A or any rule adopted under the provisions of this chapter. Pursuant to RSA 146-A:15, the Commissioner has adopted Env-C 607 to establish the schedule of fines for such violations.
3. Charles Capistran d/b/a Julien Richard Company is the registered facility owner of two 12,000-gallon horizontal aboveground storage tanks ("ASTs") that contain heating oil and are located at Cleveland Street, Manchester, NH, and further identified by the DES site number

2003-06072 and the AST identification number 0000165 located at Manchester Tax Map #0196, Lot #0004 ("the Property").

4. The AST systems at the Facility are subject to the requirements of RSA 146-A and Env-Wm 1402.
5. On November 20, 2003, DES inspectors conducted a compliance inspection at the Facility. Compliance deficiencies were identified in a Division letter dated November 24, 2003, issued to the registered owner, notifying him that compliance was to be achieved within 45-days of the date of the letter in order to avoid enforcement action per RSA 146-A:15 and Env-C 600 for those deficiencies.
6. In a letter dated December 16, 2004, the Division again notified Mr. Capistran of the deficiencies identified during the November 20, 2003 inspection, and notified him that enforcement action would be initiated if the deficiencies were not corrected within 30-days.
7. The Division was not notified that the following deficiencies were corrected within the time periods specified:
  - a) failure to prepare and implement a SPCC Plan prepared in accordance with 40 CFR Part 112;
  - b) failure to install gauges or other measuring devices on the ASTs, and for failure to have a high level warning alarm that is both audible and visible to the person controlling the transfer of oil to the ASTs; and
  - c) failure to mark the ASTs with the tank number, the safe fill height of the tank, the product stored, and the NFPA symbol.
8. Env-Wm 1402.30 requires that all AST facilities shall have a written Spill Prevention, Control, and Countermeasures Plan ("SPCC Plan") prepared in accordance with Title 40 of the Code of Federal Regulations, Part 112.
9. Env-Wm 1402.35(a) required that all AST systems installed prior to April 25, 1997, have overfill protection consisting of a product level gauge in accordance with Env-Wm 1402.24(a) and a high level alarm in accordance with Env-Wm 1402.24(b) by April 25, 2000.
10. Env-Wm 1402.35(c) requires that all AST systems installed prior to April 25, 1997, have tank markings as described in Env-Wm 1402.18(e) by April 25, 2000.

#### **IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES**

1. Charles Capistran has violated Env-Wm 1402.30 by failing to prepare and implement a SPCC Plan prepared in accordance with 40 CFR Part 112. For this violation, Env-C 615.05(b) specifies a fine of \$2,000 per 3-calendar-month period or portion thereof that the plan is not prepared or implemented, as applicable, after the deadline specified in writing by the Division. The Division proposes a fine of \$2,000 for this violation.
2. Charles Capistran has violated the overfill protection requirements of Env-Wm 1402.35(a) by failing to install gauges or other measuring devices on the ASTs, and for failing to have a high

level warning alarm that is both audible and visible to the person controlling the transfer of oil to the ASTs. For these violations, Env-C 615.03(j) specifies a fine of \$1,500 per standard that is not met per device required. The Division proposes a fine of \$1,500 for this violation.

3. Charles Capistran has violated the marking requirements of Env-Wm 1402.35(c) by failing to mark the ASTs with the tank number, the safe fill height of the tank, the product stored, and the NFPA symbol. For these violations, Env-C 615.03(c) specifies a fine of \$500 for each standard that is not met per tank. The Division proposes a fine of \$500 for this violation.

**The total fine being sought is \$4,000.**

#### **V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING**

**Pursuant to Env-C 601.06, Mr. Capistran is required to respond to this notice. Please respond no later than July 25, 2005 using the enclosed colored form.**

1. If Mr. Capistran would like to have a hearing, please have an authorized representative sign the appearance section of the colored form (upper portion), check the appropriate line requesting a **formal hearing** and return it to the DES Legal Unit, at the address noted on the form.
2. If Mr. Capistran wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance form, check the appropriate line indicating a desire to **meet informally** and return it to the DES Legal Unit.
3. If Mr. Capistran chooses to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.

Mr. Capistran is not required to be represented by an attorney. If Mr. Capistran chooses to be represented by an attorney, the attorney must file an appearance and comply with NH Admin. Rule Env-C 200.

#### **VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES**

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that the Respondent committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that the Respondent committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

\* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Respondent proves, by a preponderance of the evidence, applies in this case:**


1. The violation was a one-time or non-continuing violation, **and** the Respondent did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** the Respondent did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, Respondent was making a good faith effort to comply with the requirement that was violated.
3. Respondent has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to the Respondent's case which was not known to the Division at the time the fine was proposed.

**\*\*\*\*\*IMPORTANT NOTICE\*\*\*\*\***

**An administrative fine hearing is a formal hearing.** All hearings will be recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Mr. Capistran committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Respondent's opportunity to present testimony and evidence that Respondent did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Respondent has any evidence, such as photographs, business records or other documents, that Respondent believes show that Respondent did not commit the violation(s) or that otherwise support Respondent's position, the Respondent should bring the evidence to the hearing. Respondent may also bring witnesses (other people) to the hearing to testify on Respondent's behalf.

\*\*\*\*\*

Information regarding this proposed fine may be made available to the public via the DES Web page ([www.des.nh.gov](http://www.des.nh.gov)). If Mr. Capistran has any questions about this matter, please contact the DES Legal Unit at (603) 271-7509.

  
**COPY**  
Anthony P. Giunta, P.G.  
Director  
DES Waste Management Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Michael J. Walls, DES Assistant Commissioner  
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB  
Public Information Officer, DES PIP Office  
Kerry D. Barnsley, Compliance Attorney, DES Legal Unit  
Lynn A. Woodard, P.E., Supervisor  
Michael W. Juranty, P.E., Chief

**\*\*\* RETURN THIS PAGE ONLY \*\*\***

**CHARLES CAPISTRAN IS REQUIRED BY LAW  
TO RESPOND TO THIS NOTICE.**

**PLEASE RESPOND NO LATER THAN July 25, 2005**

Please check the appropriate line and fill in the requested information below.

**APPEARANCE** On behalf of Charles Capistran:

\_\_\_\_\_ I request to have a **formal hearing** scheduled in this matter.

\_\_\_\_\_ I would like to **meet informally** to discuss the issues in this matter.

**WAIVER OF HEARING** On behalf of Charles Capistran:

\_\_\_\_\_ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$4,000 paid to "Treasurer, State of New Hampshire" is enclosed.\*

*\* If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

**Pursuant to Env-C 203.05 please provide the following information:**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

Name (please print or type): \_\_\_\_\_

Title: \_\_\_\_\_

Phone: \_\_\_\_\_

**RETURN THIS PAGE ONLY AND ANY PAYMENT TO:**

**DES Legal Unit**

**Attn: Michael Sclafani, Legal Assistant**

**P.O. Box 95**

**Concord, NH 03302-0095**

# ENVIRONMENTAL Fact Sheet



29 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • [www.des.nh.gov](http://www.des.nh.gov)

CO-2

2002

## Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

*This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.*

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.